(3)

No. 89-568

In The

Supreme Court of the United States

October Term, 1989

CHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

STANLEY SMOLAREK AND RALPH FLEMING,
Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in reversing the district court's decision that § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts a state-law handicap discrimination claim, where the district court failed to determine whether the claim could properly arise under the Michigan Handicappers' Civil Rights Act, M.C.L. §§ 37.1101 *et. seq.*, independent of the collective bargaining agreement.

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REASONS FOR DENYING THE PETITION FOR CERTIORARI

Upon distillation, the actual issue raised by this petition is of no fundamental significance to federal preemption law. The underlying facts demonstrate that a *quirk of timing* generated such confusion, that it is difficult to disentangle the significant from the inconsequential. Respondent will carefully review the facts of this case, thereby demonstrating that this case is *sui generis*.[1] Review by the United States Supreme Court is entirely unwarranted.

Respondent (plaintiff), Ralph Fleming, filed his lawsuit in a Michigan state court on July 29, 1985. Memo-

[1] All references to Appendices refer to appendices contained in Petition for Writ of Certiorari.

randum Opinion and Order Granting Defendant's Motion for Summary Judgment, App. E, 49a. Fleming alleged that petitioner, Chrysler Corporation (hereafter Chrysler), failed to make provisions for his physical condition, which constituted handicap discrimination, pursuant to Michigan's Handicappers' Civil Rights Act, M.C.L. §§ 37.1101 *et seq.* (HCRA). *Id.* Throughout this case, Fleming's claim has been characterized as a failure-to-accommodate claim. When Fleming filed his complaint, Michigan law required "significant accommodation."[2] *Carr* v. *General Motors Corp.*, 135 Mich.App. 226; 353 N.W.2d 489, rev'd 425 Mich. 313; 389 N.W.2d 686 (1986); *Wardlow* v. *Great Lakes Express Co.*, 128 Mich.App. 54; 339 N.W.2d 670 (1983).

Thus, *on the date that Fleming filed his complaint*, he stated a cause of action which was not preempted by federal law. This proposition is explicitly acknowledged by the minority opinion below, in its discussion of other cases. Referring to *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (CA 9, 1988) and *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (CA 9, 1988), Judge Kennedy (concurring in part and dissenting in part), App. A, 25a, wrote:

> Those cases found that Ackerman's (California) and Miller's (Oregon) handicap discrimination claims were not preempted by § 301 because they did not "require interpretation of a collective bargaining agreement." Ackerman, 860 F.2d at 1517. The key difference between these cases

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[2] By the term "significant accommodation," respondent means the type of accommodation required by the Michigan Court of Appeals in *Carr* v. *General Motors Corp.*, 135 Mich.App. 226; 353 N.W.2d 489, rev'd 425 Mich. 313; 389 N.W.2d 686 (1986), and *Wardlow* v. *Great Lakes Express Co.*, 128 Mich.App. 54; 339 N.W.2d 670 (1983). This "significant accommodation" might include, for example, transfer to another duty.

> and the Michigan HCRA, however, is that the Oregon and California statutes *require* accommodation. Thus, accommodation is a *non-negotiable* right under Oregon and California law. Under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement — the right is provided by statute regardless of what the agreement may or may not provide. [Emphasis in original.]

Further, Chrysler also implicitly acknowledges that on the date Fleming filed his complaint, his cause of action was not preempted by federal law. Petition for a Writ of Certiorari, note 10, p. 27.[3]

Chrysler removed this case to federal district court on August 22, 1985. Verified Petition for Removal, NR 1. Again, utilizing the dissenting opinion's reasoning, under Michigan law in effect on the date of removal, Fleming's HCRA claim was not preempted by federal law.

On October 10, 1985, the district court denied Fleming's motion to remand. Order Denying Motion to Remand, NR 11. Again, on that date, Fleming's HCRA claim was not preempted by federal law.[4]

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[3] If not, petitioner would have this Court overrule *Ackerman* and *Miller*; in that event, petitioner is without support from the minority opinion below.

[4] The order denying remand was proper, because "Judge LaPlata ruled at that time that plaintiff's claims of breach of an implied duty of good faith and interference with pursuit of his occupation arise under § 301." Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment, App. E, 49a. Fleming did not appeal either Judge LaPlata's order denying remand nor any finding that those counts are preempted. Only the HCRA claim is at issue here.

On July 8, 1986, the Michigan Supreme Court reversed the Court of Appeals when it released *Carr* v. *General Motors Corp.*, 425 Mich. 313; 389 N.W.2d 686 (1986). There, the court held that the HCRA did not require significant accommodation.[5] At this juncture, Chrysler moved for summary judgment, contending that (1) federal law preempted Fleming's cause of action, and (2) *Carr* precluded Fleming's cause of action. Defendant Chrysler Motors Corporation's Notice and Motion for Summary Judgment, NR 36. Fleming responded to Chrysler's citation to *Carr* by noting that the *Carr* decision had not yet "issued," pursuant to Michigan's court rule, M.C.R. 7.317(C), and that a motion for rehearing had been timely filed (joined by numerous public foundations). Plaintiff's Answer to Defendant's Motion for Summary Judgment, NR 41. Accordingly, Fleming argued that *Carr* had no precedential force, until and unless the Michigan Supreme Court rejected the motion for rehearing.

Due to a quirk of timing, therefore, the district court did not construe the HCRA, under the *Carr* decision. The importance of the district court's failure to delineate the exact parameters of the HCRA and its applicability to Fleming's claim cannot be overemphasized.

With the benefit of hindsight, the district court clearly erred in failing to recognize that Michigan's HCRA must be construed and applied to the facts of this case *before* it determined whether the claim is preempted. *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. —, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (CA 9, 1988); *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (CA 9, 1988). As noted by the dissenting opinion's dis-

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[5] See footnote 2.

cussion of *Ackerman* and *Miller*, "Under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement — the right is provided by statute regardless of what the agreement may or may not provide." App. A, 25a.

Therefore, this appeal is presented in an absurd posture. The district court neglected to determine if, under current Michigan law, Fleming has a cause of action independent of the CBA. Without that determination, it was logically impossible for the district court to appropriately examine the issue of federal preemption. Accordingly, respondent respectfully submits that the procedural confusion inherent in this case minimizes its importance and leads to a denial of further review.

Petitioner insists (and the dissenting opinion agrees) that Fleming's complaint should be examined to determine if his claim is preempted. Petitioner implicitly admits, as does the dissenting opinion, that Fleming's complaint would not be preempted under Michigan law, at the time the complaint was filed. Nevertheless, petitioner insists that respondent's claim should be preempted. Petitioner's argument is:

(1) Present Michigan law undermines the 1985 complaint.

(2) Since present Michigan law undermines the 1985 complaint, plaintiff's right to accommodation must be predicated upon the collective bargaining agreement (CBA).

(3) A claim that a right is created by the CBA is preempted by federal law.

Petitioner's argument leapfrogs the critical analytical step; it is the district court's province to determine initially whether Michigan law either partially or completely undermines the 1985 complaint. Since Fleming

cannot predicate his handicapper's failure-to-accommodate claim on the CBA pursuant to *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), it is incumbent upon Fleming to demonstrate to the district court that his claim survives the *Carr* decision without recourse to the CBA, or to demonstrate that he should be permitted to amend his complaint in order to survive the *Carr* decision. The quirk of timing, whereby the trial court failed to give direct consideration to *Carr*, created this void. Without a preliminary determination of the exact scope of Michigan's HCRA, the issue of preemption cannot be resolved. Thus, the decision below appropriately remanded this action to the district court for further proceedings.

The dissenting opinion failed to recognize this gap in the district court's reasoning. Instead, the dissenting opinion observed that "the question of whether removal jurisdiction exists based upon a federal question is answered by reviewing the complaint as of the time of removal. * * * [T]he Court must look to the face of the complaint *at the time of removal.*" App. A, 20a. This proposition, although well established under ordinary circumstances, does not escape the impasse. The dissent failed to acknowledge that the "face of the complaint rule" merely raises a new question: Should the appellate court consider the Michigan law in effect at the time of removal (which clearly demonstrates that there is no preemption) or should it consider current Michigan law? The "face of the complaint" rule is simply inadequate under the circumstances of this case. It cannot remedy the essential defect in the posture of this case — that the district court never determined whether Fleming had stated, or by amending his pleadings could state, a cause of action under Michigan's HCRA, independent of the CBA.

The district court acknowledged that Fleming's complaint did not refer to the CBA between Chrysler and the United Auto Workers union. *Id.* However, the district court observed that the complaint is "replete with references to issues covered by the CBA." *Id.* Accordingly, the district court granted Chrysler's motion to dismiss Fleming's claim of handicap discrimination. *Id.* at 51a. With the benefit of hindsight, we now know that the district court used the wrong criterion. The test is not whether the complaint is "replete with references to issues covered by the CBA." The test is whether "under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement — [and whether] the right is provided by statute regardless of what the agreement may or may not provide." Opinion below (J. Kennedy concurring in part and dissenting in part), App. A, 25a. Respondent respectfully submits that the procedural confusion inherent in this case makes this cause of action inappropriate for review by the United States Supreme Court.

The majority and the minority opinions below are fundamentally harmonious. They concurred that if Fleming states a cause of action under the HCRA, independent of the CBA, the action is not preempted, but if the claimed right derives from the CBA, there is preemption. The sole distinction is that the majority opinion recognized that the district court failed to rule on whether Fleming's action does, or upon amendment could, arise from the HCRA, independent of the CBA. Judge Wellford observed that, upon remand, Chrysler may choose to rely upon the *Carr* decision. App. A, 15a. Thus, under the majority ruling, the district court will, at last, determine if respondent states a cause of action under Michigan's HCRA. Respondent respectfully submits that the minimal issue, if any,

presented by this petition does not warrant review by the United States Supreme Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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